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In the Supreme Court of the United States

OCTOBER TERM, 1973

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

H. MEDILL SARKISIAN

UNITED STATES OF AMERICA, PETITIONER

v.

ONE PACKAGE OF ANTIQUES AND INDIAN JEWELRY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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ONE PACKAGE OF ANTIQUES AND INDIAN JEWELRY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-11a) is reported at 472 F. 2d 468. The opinion of the district court (App. D, *infra*, pp. 15a-26a) is unreported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, p. 12a) was entered on January 24, 1973. A timely petition for rehearing was denied on March 9, 1973 (App. C, *infra*, pp. 13a-14a). On May 29, 1973, Mr. Justice White extended the time for filing a petition for a writ of certiorari to August 6, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether this Court's decision in *United States* v. *Thirty-Seven Photographs*, 402 U.S. 363—construing 19 U.S.C. 1305 to require prompt commencement of judicial forfeiture proceedings following the seizure by customs officers of allegedly obscene articles—compels a similar construction of 19 U.S.C. 1603 to require prompt commencement of forfeiture proceedings following the seizure of a shipment of jewelry that has been imported in violation of the customs laws.

STATUTES INVOLVED

Sections 602, 603, 604, 618, and 621 of the Tariff Act of 1930, 46 Stat. 754, as amended, 19 U.S.C. 1602, 1603, 1604, 1618, and 1621, provide as follows:

§ 1602. *Seizure; report to customs officer*

It shall be the duty of any officer, agent, or other person authorized by law to make seizures of merchandise or baggage subject to seizure for

violation of the customs laws, to report every such seizure immediately to the appropriate customs officer for the district in which such violation occurred, and to turn over and deliver to such customs officer any vessel, vehicle, merchandise, or baggage seized by him, and to report immediately to such customs officer every violation of the customs laws.

§ 1603. *Same; customs officer's reports*

Whenever a seizure of merchandise for violation of the customs laws is made, or a violation of the customs laws is discovered, and legal proceedings by the United States attorney in connection with such seizure or discovery are required, it shall be the duty of the appropriate customs officer to report such seizure or violation to the United States attorney for the district in which such violation has occurred, or in which such seizure was made, and to include in such report a statement of all the facts and circumstances of the case within his knowledge, with the names of the witnesses and a citation to the statute or statutes believed to have been violated, and on which reliance may be had for forfeiture or conviction.

§ 1604. *Same; prosecution*

It shall be the duty of every United States attorney immediately to inquire into the facts of cases reported to him by customs officers and the laws applicable thereto, and if it appears probable that any fine, penalty, or forfeiture has been incurred by reason of such violation, for the recovery of which the institution of proceedings

in the United States district court is necessary, forthwith to cause the proper proceedings to be commenced and prosecuted, without delay, for the recovery of such fine, penalty, or forfeiture in such case provided, unless, upon inquiry and examination, such United States attorney decides that such proceedings can not probably be sustained or that the ends of public justice do not require that they should be instituted or prosecuted, in which case he shall report the facts to the Secretary of the Treasury for his direction in the premises.

§ 1618. *Remission or mitigation of penalties*

Whenever any person interested in any vessel, vehicle, merchandise, or baggage seized under the provisions of this chapter, or who has incurred, or is alleged to have incurred, any fine or penalty thereunder, files with the Secretary of the Treasury under the customs laws or under the navigation laws, before the sale of such vessel, vehicle, merchandise, or baggage a petition for the remission or mitigation of such fine, penalty, or forfeiture, the Secretary of the Treasury, if he finds that such fine, penalty, or forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law, or finds the existence of such mitigating circumstances as to justify the remission or mitigation of such fine, penalty, or forfeiture, may remit or mitigate the same upon such terms and conditions as he deems reasonable and just, or order discontinuance of any prosecution relating thereto. In order to enable him to ascertain the facts, the

Secretary of the Treasury may issue a commission to any customs officer to take testimony upon such petition: *Provided*, That nothing in this section shall be construed to deprive any person of an award of compensation made before the filing of such petition.

§ 1621. *Limitation of actions*

No suit or action to recover any pecuniary penalty or forfeiture of property accruing under the customs laws shall be instituted unless such suit or action is commenced within five years after the time when the alleged offense was discovered: *Provided*, That the time of the absence from the United States of the person subject to such penalty or forfeiture, or of any concealment or absence of the property, shall not be reckoned within this period of limitation.

STATEMENT

The United States instituted one of these two consolidated actions in the United States District Court for the District of Colorado, seeking the forfeiture of a package of jewelry seized from respondent Sarkisian at the Stapleton International Airport in Denver, Colorado. The complaint alleged that the merchandise was entered into the commerce of the United States by means of false and fraudulent practices, in violation of 19 U.S.C. 1592, and that it was knowingly imported contrary to law, in violation of 18 U.S.C. 545. The claimant, respondent Sarkisian, had filed a separate suit, later consolidated with the government's, seeking return of the seized items. The

district court, after a trial, declared the merchandise forfeited to the United States (App. D, *infra*, pp. 15a-28a). The court of appeals reversed on the ground that the responsible customs officials, in referring the matter to the United States Attorney nine months after they completed their initial investigation, had failed to act "with dispatch" (App. A, *infra*, p. 10a).

1. *The statutory and regulatory framework.* Under 19 U.S.C. 1592, any imported merchandise introduced into the commerce of the United States "by means of any fraudulent or false invoice, * * * any false statement, * * * or * * * any false or fraudulent practice" is subject to forfeiture.[1] If a customs officer has "reasonable cause to believe" that merchandise he finds is subject to forfeiture, he is authorized to seize it (19 U.S.C. 482, 1581; 19 C.F.R. 162.21(a)) and is required "immediately" to report any such seizure to the "appropriate customs officer" for the district in which the violation occurred (19 U.S.C. 1602).

Any person who appears to have an interest in the seized property must be given written notice (19 C.F.R. 162.31(a)) of its liability to forfeiture and of his right to petition the Secretary of the Treasury for remission or mitigation of the forfeiture under 19 U.S.C. 1618. That section provides that the Secretary may remit or mitigate a forfeiture, upon the

[1] Similarly, 18 U.S.C. 545 provides that merchandise introduced into the United States by fraudulant means or otherwise contrary to law "shall be forfeited to the United States."

claimant's petition, if he finds that it was incurred "without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law," or if he finds other mitigating circumstances. A petition for such relief must be filed within 60 days from the date the notice of forfeiture was mailed (19 C.F.R. 171.12(b)). If the petitioner is not satisfied with the decision of the Secretary, he may file a supplemental petition within 60 days of the decision (19 C.F.R. 171.33).

If no petition is filed, or if, after consideration and decision of a petition, it appears that legal proceedings in connection with the seizure are necessary, the appropriate customs officer, after appraising the merchandise (19 U.S.C. 1606; 19 C.F.R. 162.43), must prepare a full report of the seizure for the United States Attorney, giving all the relevant facts and circumstances (19 U.S.C. 1603; 19 C.F.R. 162.32(b), 162.49(a)).[2] Upon receipt of such a report, the United States Attorney is required "immediately to inquire into the facts" and, if it appears probable that a forfeiture has been incurred, "forthwith to cause the proper proceedings to be commenced and prosecuted, without delay" (19 U.S.C. 1604).

The statute thus expressly imposes promptness requirements on the officer who effects the seizure and on the United States Attorney who prosecutes the

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[2] If the value of the seized merchandise is not more than $2,500, the customs officer may institute non-judicial, summary forfeiture proceedings. See 19 U.S.C. 1607-1609; 19 C.F.R. 162.45-162.48.

case, but it contains no such requirement with respect to the interim period, which is reserved for administrative consideration of petitions for remission or mitigation, appraisement of the seized merchandise, determination whether judicial proceedings are required, and preparation of a report for the United States Attorney. There is, however, a general statute of limitations requiring that any suit to recover a penalty or forfeiture under the customs laws be commenced within five years from the time the offense was discovered (19 U.S.C. 1621).

2. *Chronology of Administrative Proceedings.* On April 24, 1969, respondent Sarkisian's customs broker presented to a customs inspector at the Denver airport an Application for Immediate Delivery [3] of a shipment of jewelry sent from Beirut, Lebanon, to Sarkisian, an importer and dealer in oriental antiquities (Tr. 8, 22, 28, 55).[4] The broker described the contents of the shipment as "antiques" on the application, and he attached five invoices (Tr. 52, 60, 76-78). Upon examining the contents of the parcel, the customs inspector found some items not listed on the invoices, some items not listed on the invoices given him by the broker but covered by separate invoices found inside the parcel, and some items that

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[3] Under 19 C.F.R. 8.59, an Application for Immediate Delivery may be made where expedition is necessary "to avoid unusual loss or inconvenience" or to reduce port congestion. See also 19 U.S.C. 1448(b).

[4] "Tr." refers to the trial transcript, a copy of which we are lodging with this Court.

did not appear to him to be antiques (Tr. 61-62, 67, 76, 84, 90-91, 94, 96-97, 112). The inspector refused to release the parcel and forwarded it to the Customs House, where further examination by a customs commodity agent confirmed the observations of the inspector (Tr. 112, 116). The parcel and its contents were seized pursuant to 19 U.S.C. 1592 (Tr. 67, 157).

On May 13, 1969, Sarkisian, who had returned to the United States shortly after the seizure of the shipment, furnished an invoice for some of the items that had not been listed on the invoices presented on April 24 (Tr. 136). On May 26, 1969, he forwarded a letter to the Bureau of Customs asserting that all of the items in the shipment were antiques and requesting the government to return them (App. 4a; Pl. Ex. 5). The letter was treated as a petition for remission or mitigation of forfeiture under 19 U.S.C. 1618 (Tr. 27, 149-150). Accordingly, the Bureau of Customs (recently renamed the United States Customs Service) had its Customs Agency Service [5] conduct an investigation into the antiquity of the items, which required sending them to New York in August 1969 for expert examination (Tr. 214). The Customs Agency Service submitted its report on the items to the Bureau of Customs on September 16, 1969 (App. A, *infra*, p. 4a). On November 26, 1969,

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[5] The Customs Agency Service is a division of the United States Customs Service. Its function is to conduct criminal and fact-finding investigations relating to the responsibilities of the Customs Service and to provide police coverage for prevention and detection of violations of the customs laws.

in accordance with the conclusions contained in the report and after Sarkisian had submitted additional invoices, the Bureau of Customs returned to him five items determined to be antique, but none of the others (App. A, *infra*, p. 4a).

By another letter, dated December 15, 1969, Sarkisian requested the Bureau to "reanalyze the entire matter" and submitted several comprehensive questions about his alleged violations of the customs laws and the basis for the proposed forfeiture. Government records show that the Bureau of Customs treated this as a supplemental petition for remission or mitigation and that on March 16, 1970, after review by the Bureau, Sarkisian's questions were answered and he was informed that the Bureau had reaffirmed its first decision.

On March 23, 1970, Sarkisian replied by submitting affidavits relating to the items' antiquity, which he had obtained from foreign sellers at the time of his purchases (Def. Ex. C; see Tr. 226). On April 17, 1970, the Bureau of Customs asked Sarkisian to cross-index these affidavits to the items of jewelry so that proper identification, evaluation, and reevaluation could be conducted. Again, it was necessary for the Customs Agency Service to forward the items to New York for examination by an expert in light of each of the affidavits (Tr. 226, 229).

On April 28, 1970, while the Bureau of Customs was still conducting its second investigation of the items at Sarkisian's request to determine whether they should be remitted to him, he filed suit for re-

turn of the items (App. A, *infra*, p. 4a). On May 18, 1970, the Assistant United States Attorney in charge of the matter told Sarkisian's attorney that he would try to obtain a report from the Bureau of Customs and, if satisfactory disposition were not made, to institute forfeiture proceedings within 30 days (H. 3, 4-5).[6] The Bureau could not prepare the report within that period, however, because the files were scattered in various parts of the country pursuant to the Bureau's investigation of Sarkisian's claims (H. 5). Sarkisian's motion of July 9, 1970, seeking return of the items because of the government's failure to file its own action within the 30-day period was denied by the district court (H. 7-9).

On June 24, 1970, the United States Attorney filed a libel for forfeiture of the seized items.

3. *The decisions below.* The government's forfeiture action was consolidated with Sarkisian's pending suit, and on October 26, 1971, the district court found that Sarkisian had failed to carry his burden of proof (19 U.S.C. 1615) to show that he did not knowingly and fraudulently attempt to import the jewelry in violation of the customs laws. After a detailed review of the evidence bearing on Mr. Sarkisian's credibility (App. D, *infra*, pp. 20a-25a), the court stated (*id.* at 25a): "[I]t appears that the contradictions inherent in Mr. Sarkisian's own conduct and testimony and the totally unlikely set of circumstances

[6] "H." refers to the transcript of the hearing on Sarkisian's motion for a return of the seized jewelry, held in the district court on July 17, 1970. We are lodging a copy of that transcript with this Court.

required to support his version of the facts, do not furnish a satisfactory explanation." It accordingly ordered the merchandise forfeited to the United States (*id.* at 27a-28a).

The court of appeals reversed solely on the ground that the nine-month delay between completion of the Customs Agency Service's investigation (September 16, 1969) and the filing of the government's forfeiture action (June 24, 1970) "was too great under the statute sought to be used by the Government" (App. A, *infra*, p. 8a). The court recognized that, while Section 1602 requires immediate reporting of a seizure to the appropriate customs official and Section 1604 directs commencement of judicial proceedings promptly after the United States Attorney has received a pre-litigation report from the Bureau of Customs, Section 1603 contains no express requirement that the appropriate customs officer investigate the matter and refer it to the United States Attorney expeditiously or within any particular time period (*id.* at 6a-7a). It held, however, that such a requirement must be read into the statute in order to preserve its constitutionality. The court relied on this Court's decision in *United States* v. *Thirty-Seven Photographs*, 402 U.S. 363, in which 19 U.S.C. 1305 (a)—permitting the seizure and forfeiture of obscene articles—was construed as imposing a strict time limitation for the commencement and conclusion of forfeiture proceedings in order "to bring it in harmony with constitutional requirements" (402 U.S. at 368). In the court of appeals' view, the seizure

of Sarkisian's jewelry "presents a constitutional claim of no less dignity than that arising from the dirty pictures" in *Thirty-Seven Photographs*, and it therefore applied "the same principles" (App. A, *infra*, p. 11a).[7]

REASONS FOR GRANTING THE WRIT

The decision below rests on a fundamental misunderstanding of this Court's decision in *Thirty-Seven Photographs*. The resulting construction of 19 U.S.C. 1603 by the court of appeals is at war with the statutory scheme providing for administrative consideration of petitions for relief of forfeitures and penalties. If left undisturbed, the decision may seriously disrupt the orderly administrative processing of thousands of customs seizures each year and may precipitate premature litigation in many cases where a satisfactory administrative resolution could otherwise be achieved. The issue is thus crucial to the administration of the customs laws and should be resolved by this Court.

1. In *Freedman* v. *Maryland*, 380 U.S. 51, this Court struck down a state statutory scheme requiring the submission of motion pictures to a board of censors for their approval prior to exhibition. The Court held that such a scheme could avoid violating the

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[7] On June 18, 1973, the court of appeals denied the government's application for a stay pending the filing of this petition. On June 29, 1973, Mr. Justice Marshall ordered that the execution of the court of appeals' mandate be stayed pending the timely filing of a petition for a writ of certiorari.

First Amendment, as applied to the states through the Fourteenth Amendment's due process clause, only if it provided for "a prompt final judicial decision" as a precondition to denial of a license (*id.* at 59). That requirement was considered essential, as this Court later stated in *Thirty-Seven Photographs*, "so that administrative delay does not in itself become a form of censorship" (402 U.S. at 367).

The decision in *Thirty-Seven Photographs* rested on the *Freedman* rationale. Customs agents had seized allegedly obscene photographs from the claimant pursuant to 19 U.S.C. 1305, which authorizes the seizure and forfeiture of any obscene article imported from a foreign country. The statute does not on its face contain time limits of the sort required by *Freedman*, and it was on the basis of that omission that the claimant attacked its constitutionality. This Court found it unnecessary to rule on the statute's constitutionality, however, because it determined that the statute could be construed, "consistent with its legislative purpose," to avoid the constitutional issue (402 U.S. at 370). "[F]idelity to Congress' purpose dictates that we read explicit time limits into the section" (*id.* at 372). The Court accordingly held that forfeiture proceedings under the statute must be commenced within 14 days of the seizure and completed within 60 days of their commencement. At the same time, it emphasized that "[n]o seizure or forfeiture will be invalidated for delay * * * where the claimant is responsible for extending either ad-

ministrative action or judicial determination beyond the allowable time limits" (*id.* at 374).

The court of appeals considered *Thirty-Seven Photographs* controlling in this case. It therefore held that the administrative proceedings following a seizure of ordinary merchandise such as jewelry must be completed "with dispatch" (App. A, *infra*, p. 10a), and that 19 U.S.C. 1603 must be construed to contain time limitations like those in Sections 1602 ("immediately" report each seizure) and 1604 ("immediately" inquire into the facts, "forthwith" commence proceedings, and prosecute "without delay"). This view of *Thirty-Seven Photographs* is wrong for several reasons:

(a) The First Amendment values that were threatened by a seizure of allegedly obscene articles under Section 1305 have no bearing whatever on a seizure of jewelry under Section 1592. There is here no comparable danger that "administrative delay [may] * * * itself become a form of censorship" (402 U.S. at 367). The question is not, as the court of appeals viewed it (App. A, *infra*, p. 11a), whether the seizure of jewelry "presents a constitutional claim of no less dignity than that arising from the dirty pictures," but whether jewelry is entitled to the same First Amendment protection as photographs and books. The answer to that question is self-evident.[8]

[8] It may be that the court of appeals misread the opinion in *Thirty-Seven Photographs* as reading time limits into the statute in order to avoid Fifth Amendment, rather than First Amendment, problems (see App. A, *infra*, pp. 5a, 7a). The

No censorship or possible suppression of ideas is involved in the seizure of jewelry, antique or not.

(b) Whereas "fidelity to Congress' purpose dictate[d]" the Court's interpretation of Section 1305 (402 U.S. at 372), the legislative purpose underlying Section 1603 is wholly inconsistent with the imposition of time limitations. The statutory scheme itself strongly suggests the congressional objective of encouraging thorough and deliberate administrative consideration in order to avoid litigation if possible. Thus, a claimant is afforded an opportunity under 19 U.S.C. 1618 to petition for remission or mitigation of a forfeiture or penalty.[9] It is implicit in that provision, when read in conjunction with Section 1603, that the Bureau of Customs must be expected to make the necessary investigations and evaluations and to grant relief administratively if that is appropriate, and that the Bureau is to refer the case to the United States Attorney only after con-

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opinion in *Thirty-Seven Photographs* contains no suggestion that the Court's decision rested at all on Fifth Amendment considerations. In any event, there is no basis for concluding that in this case, involving on-going, good faith, administrative consideration of Sarkisian's requests for relief, the absence of time limits in Section 1603 subjected him to a deprivation of his property without due process of law.

[9] It is difficult to conceive that petitions under Section 1618 with respect to seized articles of all kinds (rather than just allegedly obscene materials) could feasibly be processed administratively within the 14 day time limit from the date of seizure read into Section 1305(a) in *Thirty-Seven Photographs* (402 U.S. at 373-374). The court of appeals did not indicate the specific time limits that would apply under its construction of Section 1603.

cluding that the matter cannot be resolved administratively and that judicial proceedings are necessary. That Congress provided a general five-year statute of limitations for the commencement of forfeiture proceedings (19 U.S.C. 1621) implies that it expected the period between seizure and litigation could be extended where fruitful administrative consideration and negotiation was continuing.

The Bureau of Customs' regulations similarly contemplate thorough administrative processing in seizure cases. A petition for relief need not be filed until 60 days after the notice of liability to forfeiture (19 C.F.R. 171.12(b)), and a supplemental petition, requiring further consideration, need not be filed until 60 days after the initial decision (19 C.F.R. 171.33).

The legislative history points in the same direction. Prior to 1922, all petitions for mitigation and remission had to be filed in the district courts, which were to inquire in a summary fashion into the circumstances of the case, enter findings, and then forward the findings together with the petition to the Secretary of the Treasury, who thereupon had power to mitigate or remit the fine, forfeiture, or penalty.[10] In its reform of the customs laws in 1922, Congress provided that the petitions were to be submitted directly to the Secretary of the Treasury.[11] Even then, however, the statute carried forward the sub-

[10] Act of June 22, 1874, § 17, 18 Stat. 189-190, as amended by Act of February 27, 1877, § 1, 19 Stat. 252-253.

[11] Act of September 21, 1922, § 618, 42 Stat. 987-988.

stance of earlier provisions requiring the customs collector "promptly" to report any seizure to the United States Attorney for the institution of forfeiture proceedings.[12]

In 1938, the law was amended to minimize unnecessary litigation and to increase reliance on administrative processing after a seizure. The amendment eliminated the requirement that cases be referred to the United States Attorney "promptly" and added the present provision that referral should be made only where "legal proceedings * * * are required." [13] The history of the amendment confirms that its purpose was to allow for thorough administrative consideration of seizures and petitions for relief before litigation is undertaken.[14] The court of appeals thus read into Section 1603 a requirement that Congress deliberately took out in 1938.

(c) In *Thirty-Seven Photographs* this Court in fact recognized that the statutes at issue here do

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[12] *Id.* at § 603, 42 Stat. 984.

[13] Act of June 25, 1938, § 27, 52 Stat. 1089.

[14] A section-by-section analysis of the bill submitted by the Treasury Department stated:

> The provisions of section 603 of the Tariff Act of 1930 * * * make it the duty of the collectors of customs to report to the Solicitor of the Treasury and to the local United States Attorney all seizures of merchandise made for violation of the customs laws. Since legal proceedings are not necessary in connection with many seizures, it is proposed to require reports to be made to the United States attorneys only in cases in which legal proceedings are required. [Hearings Before the House Committee on Ways and Means on H.R. 6738, 75th Cong., 1st Sess., May 19-June 1, 1937, p. 138.]

not require prompt referral of cases to the United States Attorney. The government had argued there that, even if Section 1305 lacked time limits, suitable limits were contained in Sections 1602 and 1604, which are applicable to seizures generally, including seizures of obscene articles. The Court found it unnecessary to consider whether those sections were applicable "for even if they were applicable, they would not provide adequate time limits and would not cure [Section 1305's] invalidity. The two sections contain no specific time limits, *nor do they require the collector to act promptly in referring a matter to the United States Attorney for prosecution*" (402 U.S. at 368, n. 2; emphasis added).[15]

(d) Finally, in *Thirty-Seven Photographs* this Court made clear that delay caused by the claimant's efforts to obtain administrative relief is not a basis for invalidating a seizure or forfeiture. Here, however, the court of appeals in effect established a *per se* rule of delay, since the delay in this case was attributable to the administrative reviews and investigations in response to Sarkisian's petition for relief, his supplemental petition for relief, and his further submission of affidavits bearing on the antiquity

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[15] The court of appeals apparently drew from this footnote the incorrect inference that the Court meant to *condemn* the two sections because of their lack of time limits (App. A, *infra*, pp. 9a-10a). But the reason Sections 1602 and 1604 would not cure any invalidity in Section 1305 was not, as the court of appeals assumed, that those sections were themselves unconstitutional, but because they did not contain the assurance of promptness that appeared to be missing in Section 1305.

of the jewelry. It was at his instance that the administrative process had not concluded and the judicial process had not commenced earlier than they did. The court of appeals nevertheless looked only to the time that elapsed, without regard to the reason for the delay (see App. A, *infra*, pp. 7a-8a).[16]

2. The court of appeals' interpretation of Section 1603 thus defeats the legislative purpose in enacting the provision and distorts this Court's holding in *Thirty-Seven Photographs*. It would also, if left undisturbed, seriously disrupt the orderly administration of the customs laws. The Bureau of Customs makes about 63,000 seizures annually for customs violations (*Statistical Appendix to Annual Report of the Secretary of the Treasury on the State of the Finances for the Fiscal Year Ended June 30, 1972*, p. 282, Table 84). We are informed by the Bureau that in fiscal year 1973 the Customs Agency Service conducted approximately 8,500 investigations relating to customs seizures, many of which, as in this case, required careful expert examination of the seized merchandise to determine whether a customs violation had occurred. In addition, we are informed that the Bureau considered in fiscal year 1973 approximately 2,600 petitions for relief from forfeitures.

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[16] Even if Section 1603 could properly be construed to prohibit "unreasonable" delays—and we believe the record is clear that there was no unreasonable delay in this case—the court of appeals should not itself have finally disposed of the case, but would at most have been justified in remanding to the district court for a hearing on the causes of the delay in the instant case.

Only a very small proportion of seizure cases presently reach the courts. To require prompt referral of matters to the United States Attorneys would burden the courts and the United States Attorneys with unnecessary litigation and would put claimants to the often needless expense of litigation to protect their rights, while depriving them of the thorough administrative consideration to which they are entitled.[17] Indeed, the result could be that the Customs Bureau would find it necessary to eliminate many of the extensive investigations it now conducts and which result in the settlement without litigation of most customs seizure cases.

Congress has historically shifted the burden of investigating seizures and considering applications for relief away from the courts and onto the customs authorities. The decision in this case would turn the statutory scheme on its head. The question is of substantial practical importance and should be resolved by this Court.

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[17] Under 19 C.F.R. 171.1(a), for example, no administrative action may be taken on any petition for relief if the case has been referred to the United States Attorney for institution of legal proceedings. Any petition received in that period must be forwarded to the United States Attorney.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be granted.

ROBERT H. BORK,
Solicitor General.

HENRY E. PETERSEN,
Assistant Attorney General.

MARK L. EVANS,
Assistant to the Solicitor General.

JEROME M. FEIT,
JOSEPH S. DAVIES, JR.,
Attorneys.

August 1973.

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 72-1115—JANUARY 1973 TERM

H. MEDILL SARKISIAN, APPELLANT

v.

UNITED STATES OF AMERICA, and KELLY TIPPS, PORT DIRECTOR OF CUSTOMS FOR STATE AND DISTRICT OF COLORADO, APPELLEES

UNITED STATES OF AMERICA, APPELLEE

v.

ONE PACKAGE OF ANTIQUES AND INDIAN JEWELRY, APPELLANT

Appeal from the United States District Court for the District of Colorado
(D.C. ## C-2231, C-2384)

Albert B. Wolf, of Meer & Wolf, Denver, Colorado (Walter Slatkin, Denver, Colorado, with him on the Brief), for Appellant.

Charles W. Johnson, Assistant United States Attorney (James L. Treece, United States Attorney, with him on the Brief), for Appellees.

Before PHILLIPS, SETH, and HOLLOWAY, Circuit Judges.

SETH, Circuit Judge.

Two suits were filed in the United States District Court for the District of Colorado concerning an air shipment of jewelry which arrived at Denver, Colorado, from Lebanon. The jewelry was seized by customs agents when the container was opened at the airport. The owner filed an action to recover it, and the Government filed proceedings to forfeit the shipment. The suits were consolidated and the trial court held for the Government. The owner has taken this appeal which raises several issues, including the constitutional implications in the delay by the Government in instituting forfeiture proceedings, the failure of proof by the Government, the unconstitutional burden of proof placed on the owner by statute, and that attempted forfeiture of all the items in the container was improper.

The record shows that the owner bought old jewelry in the Near East, and sent a suitcase containing some jewelry from Beirut to Denver. The shipment arrived at Denver while the owner was still in Europe. Upon its arrival, the carrier asked a representative of the owner's customs broker if he would receive it. This representative did not usually handle the owner's shipments, so he called the owner's office and was told to do the "paper work" on the bag. However no information as to the contents or the invoices was given to the representative and he had no such information from other sources other than invoices given him by the carrier. Some of the invoices had been attached to the outside of the parcel, and as it later developed some were inside and one was missing. The representative, in the presence of the customs agent, made out a form of Application for Immediate Delivery (AID) under 19 C.F.R. § 8.59, and attached the invoices given to him by the carrier. These invoices indicated that practically all of the items they covered were antiques. The representative wrote on the AID form "antiques." The bag was opened by customs, and it was revealed that the invoices attached to the AID form did not cover the entire contents of the bag, that other invoices were wrapped in small parcels in the bag and one was missing. The agent seized the shipment on April 24, 1969, apparently because all the invoices were not presented. When the owner returned he presented the missing invoice on May 13, 1969. The customs authorities took the position that all the items in the

bag were not antiques and there was correspondence on this point. The goods were sent to New York twice for examination as to their antiquity. The invoices did not describe all the items as antique. However, the owner in a letter dated May 26, 1969, did assert to customs that all were antiques, and asked about the status of the matter. This claim that all were antiques was obviously wrong, and he later retracted this as to some of the items. This letter was taken by the officials to be a request for remission or mitigation of penalties under 19 U.S.C. § 1618, and an investigation was conducted. Five of the items were returned to the owner as being antiques. The investigation was concluded on September 16, 1969, and a report submitted. There was later correspondence on the antique subject, and inquiries by the owner as to the status of the matter. The explanations given by the owner as to why one invoice was missing was implausible, but the absence of the invoice was not a real issue in the case although considerable consideration was given to the matter. The regulations do not require all invoices to be presented with the Application for Immediate Delivery. The issue before suit related to the antique question as indicated by the return of some items to the owner.

The owner filed suit on April 28, 1970, to have the goods returned to him, some conferences were had, and the United States Attorney indicated that he would file suit within thirty days if the matter was not resolved. The thirty days expired and no such suit was filed. The trial judge's secretary then called

the United States Attorney to remind him of the thirty day period. The Government suit seeking forfeiture was filed a few days thereafter on June 24, 1970. The antique issue continued at the trial, and the Government there acknowledged that some of the remaining items were antiques, and did not contest the claim as to others. However, it continued to assert that some of the jewelry was not antique.

We consider the delay in commencing proceedings by the Government to be the basic issue on appeal. The owner of the goods urges that the delay by the collector in taking action under 19 U.S.C. § 1603 to report to the United States Attorney that the seizure had been made constituted a violation of his constitional rights, and was also a failure to follow the statutory provisions properly construed. The owner relies on requirements for protection of Fifth Amendment rights mentioned in United States v. United States Coin & Currency, 401 U.S. 715, concerning a forfeiture sought under 26 U.S.C. § 7302, and the requirements read into 19 U.S.C. § 1305(a) in United States v. Thirty-Seven Photographs, 402 U.S. 363, for its constitutional "salvation" under Freeman v. Maryland, 380 U.S. 51.

We view the delay issue here presented as having essentially the same implications, and involving the same principles as were considered in Thirty-Seven Photographs. As hereinafter indicated we consider only one segment of the total time which elapsed.

The pertinent statutory provisions relating to the delay issue are as follows:

19 U.S.C. § 1602 provides in part:

"It shall be the duty of any officer, agent, or other person authorized by law to make seizures of merchandise or baggage . . . , to report every such seizure immediately to the appropriate customs officer for the district. . . ."

19 U.S.C. § 1603 provides in part:

"Whenever a seizure of merchandise for violation of the customs laws is made, . . . and legal proceedings by the United States attorney in connection with such seizure . . . are required, it shall be the duty of the appropriate customs officer to report such seizure or violation to the United States attorney for the district . . . ."

19 U.S.C. § 1604 provides in part:

"It shall be the duty of every United States attorney immediately to inquire into the facts . . . , and if it appears probable that any fine, penalty, or forfeiture has been incurred by reason of such violation, for the recovery of which the institution of proceedings in the United States district court is necessary, forthwith to cause the proper proceedings to be commenced and prosecuted without delay, . . . unless, upon inquiry and examination, such United States attorney decides such proceedings can not probably be sustained . . . , in which case he shall report the facts to the Secretary of the Treasury for his direction in the premises."

It is apparent that the sections referring to the officer making the initial seizure and to the United States Attorney require immediate action. Section 1603 relating to the collector to whom the seizure is reported contains no language requiring expeditious

determination of whether forfeiture proceedings are required. It is this section which is concerned here with the Government taking the position that no time limitation should be placed on this step in the proceedings. The owner of the goods seized asserts that such application of the section and the delay here involved violate his Fifth Amendment rights, if the decision in Thirty-Seven Photographs is here applied.

A brief summary of the time sequence shown by the record is necessary:

(1) Date of seizure of goods—April 24, 1969.

(2) All invoices furnished to customs—May 13, 1969.

(3) Sarkisian's letter claiming that all items were antique and inquiring as to status of matter—May 26, 1969.

(4) Investigation by customs completed—September 16, 1969 (further correspondence followed, however).

(5) Sarkisian filed suit seeking return of goods —April 28, 1970. This is one year after seizure.

(6) Government agreed to file suit within thirty days—May 18, 1970.

(7) Owner filed motion for return of goods—June 18, 1970.

(8) Suit filed by Government seeking forfeiture —June 24, 1970 (this is a year and two months after seizure).

We give consideration only to the period of time which elapsed between the date the customs investi-

gation was completed, and the filing of the action to forfeit by the United States Attorney. This is the period between September 16, 1969, and June 24, 1970, or about nine months. As mentioned, the Government suit was not started until after the owner had filed suit to have the goods returned to him, and after a suggestion plus a reminder by the trial court to do so in the face of the owner's motion for return of goods. This lapse of time was too great under the statute sought to be used by the Government, and under the opinion of the Supreme Court in United States v. Thirty-Seven Photographs.

We have quoted portions of 19 U.S.C. §§ 1602 and 1604. These require that the customs agent making the seizure ". . . report every such seizure immediately to the appropriate customs officer for the district . . ."; that the customs officer ". . . report such seizure or violation to the United States attorney . . ."; and that the United States attorney ". . . immediately inquire into the facts . . . ," and if proceedings in the United States District Court are necessary ". . . forthwith to cause the proper proceedings to be commenced and prosecuted without delay . . . ," and to otherwise report the facts to the Secretary of the Treasury. The admonitions to report "immediately" and to "forthwith" file an action directed to the seizing officer and to the United States Attorney are a sufficient indication that the proceedings in between the "immediately" and the "forthwith" must also be conducted with comparable dispatch if the several sections are to be construed to sustain them

against an attack directed to their constitutionality. Thus the collector, or principal local officer, of the Customs Service referred to in 19 U.S.C. § 1603 must also proceed to perform his functions as quickly, although the section of the statute referring to him does not expressly provide for action within a specified time nor "immediately." It is apparent that the expedited proceedings by the seizing agent and by the United States Attorney can mean little if between the two there is a delay of any consequence, as there was in the case before us.

The Supreme Court in a footnote at 402 U.S. 368 to United States v. Thirty-Seven Photographs refers to 19 U.S.C. §§ 1602 and 1604. The Court there considers the suggestion by the United States that the limitations stated in the two sections be applied in Thirty-Seven Photographs to cure the deficiency in 19 U.S.C. § 1305(a). The Court quotes the "immediately" and the "forthwith" and says:

> "We need not decide, however, whether §§ 1602 and 1604 can properly be applied to cure the invalidity of § 1305(a), for even if they were applicable, they would not provide adequate time limits and would not cure its invalidity. The two sections contain no specific time limits, nor do they require the collector to act promptly in referring a matter to the United States Attorney for prosecution. Another flaw is that § 1604 requires that, if the United States Attorney declines to prosecute, he must report the facts to the Secretary of the Treasury for his direction, but the Secretary is under no duty to act with

speed. The final flaw is that neither section requires the District Court in which a case is commenced to come promptly to a final decision."

Thus the Court points out that neither section contains a specific time limit, and also that there is no requirement that the collector act promptly in referring the matter to the United States Attorney. Thus for the proceedings here taken to be upheld against the owner's objections, it was necessary for the collector to have acted with dispatch. The lapse of nine months after the completion of the investigation did not meet such a requirement, and the Government's proceeding to forfeit must fail.

Again in United States v. Thirty-Seven Photographs, 402 U.S. 363, the Court laid down a time requirement which is extremely short compared to the several time periods in this case. 19 U.S.C. § 1305 (a) there considered by the Supreme Court contained no time periods nor direction to proceed with great dispatch, but the Court found such requirement to be necessary to salvage the statute in the face of the attack on its constitutionality. The Court was there concerned with the seizure by customs officials of the photographs as obscene as against the First Amendment claim of the person bringing them into the country. The photographs were to become part of a book to be published, and the importation was for a commercial use. The censorship aspects of the Thirty-Seven Photographs case, as related to the need for prompt action, does not distinguish the case as the Government here urges. The withholding of Sarki-

sian's property under the circumstances before us presents a constitutional claim of no less dignity than that arising from the dirty pictures. We thus apply the same principles. The time necessary to decide that the obscene nature of the photographs required that suit be brought would not seem to be a great deal different than the time required to decide to bring suit because the goods were entered by means of fraudulent invoices, declarations, paper, or false statement under 19 U.S.C. § 1592, and certainly not after customs had completed its investigation or has had reasonable time to do so. Thus 19 U.S.C. § 1603 must also contain time limitations comparable to the section preceding it and the one following, and we construe the section to so provide. For these purposes we consider it to be constitutional when so read, but it has obviously not been complied with. See Crowell v. Benson, 285 U.S. 22.

The judgment of the trial court is set aside, and the case is REVERSED AND REMANDED with the direction to grant Sarkisian's motion to have the goods in issue released and delivered to him.

APPENDIX B

JANUARY TERM — JANUARY 24, 1973

Before Honorable Orie L. Phillips, Honorable Oliver Seth and Honorable William J. Holloway, Jr., Circuit Judges

No. 72-1115

H. MEDILL SARKISIAN, APPELLANT

v.

UNITED STATES OF AMERICA, and KELLY TIPPS, PORT DIRECTOR OF CUSTOMS FOR STATE AND DISTRICT OF COLORADO, APPELLEES

UNITED STATES OF AMERICA, APPELLEE

v.

ONE PACKAGE OF ANTIQUES AND INDIAN JEWELRY, APPELLANT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Colorado, and was argued by counsel.

On consideration whereof, it is ordered that the judgment of the trial court is set aside, and the case is reversed and remanded with the direction to grant Sarkisian's motion to have the goods in issue released and delivered to him.

HOWARD K. PHILLIPS,
Clerk

By: /s/ Lavon M. Irlbeck,
LAVON M. IRLBECK,
Deputy Clerk

[SEAL]

APPENDIX C

JANUARY TERM — MARCH 9, 1973

Before Honorable David T. Lewis, Chief Judge, Honorable Orie L. Phillips, Senior Circuit Judge, Honorable Delmas C. Hill, Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable James E. Barrett, and Honorable William E. Doyle, Circuit Judges.

No. 72-1115

H. MEDILL SARKISIAN, APPELLANT

v.

UNITED STATES OF AMERICA, and KELLY TIPPS, PORT DIRECTOR OF CUSTOMS FOR STATE AND DISTRICT OF COLORADO, APPELLEES

UNITED STATES OF AMERICA, APPELLEE

v.

ONE PACKAGE OF ANTIQUES AND INDIAN JEWELRY, APPELLANT

This matter comes on for consideration of the petition for rehearing and suggestion for rehearing en banc filed by the appellee, United States of America, in the captioned case.

Upon consideration whereof, the petition for rehearing is denied by Circuit Judges Phillips, Seth and Holloway to whom the case was argued and submitted.

The petition for rehearing having been denied by the original panel to whom the case was argued and submitted and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the petition for rehearing en banc is denied.

HOWARD K. PHILLIPS,
Clerk

By: /s/ Lavon M. Irlbeck,
LAVON M. IRLBECK,
Deputy Clerk

[SEAL]

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

[Filed United States District Court, Denver, Colorado, October 26 1971]

No. C-2384

UNITED STATES OF AMERICA, PLAINTIFF

vs.

ONE PACKAGE OF ANTIQUES AND INDIAN JEWELRY, DEFENDANTS

Mr. Charles W. Johnson, Assistant United States Attorney, Denver, Colorado and Mr. David Lindsey, Solicitors Office, U.S. Customs, Houston, Texas, for Plaintiff

Mr. Albert B. Wolf of the firm Meer & Wolf, Denver, Colorado for Defendants

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FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

Before, LUTHER B. EUBANKS, United States District Judge, Assigned

This matter came on for trial to the Court commencing on May 6, 1971. Trial was concluded on

May 12, 1971, each party having been afforded the opportunity to offer such evidence as they deemed necessary. The libelant, United States of America was represented by Charles Johnson, Esq., Assistant United States Attorney, and David Lindsey, of the Solicitor's Office, U.S. Customs, and the claimant, H. Medill Sarkisian by Albert B. Wolf, Esq.

At the conclusion of trial the Court took the matter under advisement and counsel for both parties were asked to submit proposed findings of fact and conclusions of law to the Court and were then given an opportunity to submit argument to the Court on the proposals of the adverse counsel. That procedure has now been completed and the Court has studied the proposed findings and conclusions, counsel's arguments thereon and has further reviewed the reporter's transcript and the exhibits.

This is a suit in admiralty. The United States, libelant, has seized property of Mr. H. M. Sarkisian, when said property was imported into the United States. The seizure was made pursuant to Section 592 of the Customs regulations, to be found in Title 19, United States Code, § 1592. The United States claimed that the goods were illegally entered with fraudulent intent because some of the goods were not invoiced at the time of entry, some of the invoices were concealed inside the package and some of the goods were not antiques as declared.

The claimant, H. M. Sarkisian, filed a plea with Customs to recover the merchandise but said plea was denied.

The present suit is to determine whether the seizure by the United States was proper or whether the goods should be returned to the claimant.

In a forfeiture proceeding, it is incumbent on the United States, as libelant, to prove probable cause for the institution of the action. If the United States makes such a showing, then the burden of proof shifts to the defendant to show that he did not violate the customs laws either fraudulently or knowingly. Title 19, United States Code, § 1615.

Thus, the analysis to follow will be broken down into two parts: (1) the libelant's prima facie case, and (2) the claimant's defense based on mistake as opposed to fraudulent intent.

Libelant's Prima Facie Case

The Court has previously ruled, at the end of the libelant's evidence, that a prima facie case had been produced by the United States.

At the time claimant's Application for Immediate Delivery (formally called a Provisional Release form) was presented to the customs inspector, not all of the merchandise in the bag had been declared or invoiced. The testimony of Mr. Miller and Mr. Ehret of the Customs Service was not rebutted. Mr. Sarkisian in his letter of May 26, 1969, admitted that some documents were missing, but he attempted to make explanation therefor; he made the same admission at the trial and offered further explanation.

Inspection and examination of the package revealed additional invoices within the package, under

clothes, which covered merchandise not wrapped with the invoices. Mr. Sarkisian did not deny this, but again he attempted to offer an explanation for the deed.

Although the invoices outside the package claimed all of the items therein were antiques, a substantial portion were not antiques. The government experts, Altes and Greenburg, both testified to restructuring and recent manufacture based on visual examination using common indicia known to the claimant Sarkisian. The claimant had sufficient familarity with Indian and Near Eastern jewelry to determine the non-antiquity of the merchandise. Some he admitted to be new, some are admitted by the Government to be antique, and some are disputed items.

In connection with Customs Regulations regarding antiquity, there are certain restrictions as to age, repair and restructuring which have been considered. (Tariff Schedule, Part II, Subject B, 19 C.F.R., Sec. 10.53(d).

Based on the foregoing, it is clear that the Government established probable cause for the seizure. Probable cause means less than evidence that would justify condemnation or conviction. U.S. v. A Lot of Jewelry, 59 F. 684.

The failure of an agent of the importer to declare goods as instructed does not relieve the principal from forfeiture. U.S. v. Strand of Pearl Necklace, 260 F. 671. Here, there was admittedly no instruction at all to the agent.

Further, the failure to have an invoice may be fraudulent. The Felicia, 13 F. Supp. 959; and concealment and undervaluation of goods are grounds for probable cause. Taylor v. U.S., 44 U.S. 197; U.S. v. 169 Bales, 56 F.2d 736.

The presentation of an Application for Immediate Delivery (Customs Form 3461) constitutes a formal entry. (See 19 C.F.R., Sec. 8.59(b), and the invoices attached shall be used as the entry itself. (See 19 C.F.R., Sec. 8.59(g).

In the case of U.S. v. 18 Packages of Dental Instruments, 230 F. 564, app. dismissed 37 S.Ct. 212, 242 U.S. 617, 61 L.Ed. 530, the Court held that merchandise intended for entry into the United States, may be the proper subject of forfeiture proceedings even though there has been no actual introduction into commerce through a completed formal entry.

The statement of antiquity made by the importer, consignee or agent cannot be withdrawn once the Bureau of Customs examination starts. (See 19 C.F.R., Sec. 10.53(h).

Therefore, under the facts and the law, the action of the United States in seizing the property was proper, and a prima facie case for forfeiture of the merchandise was presented.

Defense of Accident, Mistake or Inadvertence

Although the claimant Sarkisian did not concede that the United States had made out a prima facie case, he did admit several errors concerning the ship-

ment. His main defense, and the real issue of the case, was that the various errors were a result of accident, mistake or inadventence. The burden of proof is on him to convince the Court of his innocence and to negative any fraudulent intent to evade the payment of customs duties.

We have the testimony of Mr. Sarkisian that he did not intend any wrongful act. In order to determine the accuracy of that testimony in the framework of all the evidence, it is necessary to look at two things: (1) Mr. Sarkisian's credibility when tested against material discrepancies in his testimony or other positive refutation; and (2) the likelihood of the events and circumstances as related by Sarkisian in defense of the various errors committed on entry of the merchandise.

In regard to credibility, Mr. Sarkisian's trial testimony varied substantially from his prior conduct:

1. Sarkisian testified at the trial, he knew some invoices had been removed and mailed separately from Beirut. But previously, on May 13, 1969, he insisted to Customs Specialist Ehret that all the invoices were present in the parcel, including a copy of the French invoice.

2. Sarkisian maintained that bag was wrapped in burlap with stencil saying "all invoices inside". But he also admitted that all the invoices were not inside and that in spite of this, he did not notify customs or his agents.

3. Sarkisian claimed he mailed invoices to his secretary. The secretary, Mrs. Holme, admitted receiving them. Then, on last day of trial, Sarkisian testified that the only letter went to his wife.

4. On the question of antiquity, Sarkisian wrote to customs on May 26, 1969, claiming all items were antique. This was one month after seizure, but he claims that he had forgotten what was in the bag and that some items were not antique.

5. In the letter to customs claiming antiquity of 350 yr.-1000 yr. old (letter of May 26), Sarkisian later testified he may "have stretched a point a little bit."

6. When Ehret and Morgan showed earrings and toe rings to Sarkisian, he first claimed they were antique, but later conceded the earrings were new and the next day conceded that toe rings were new.

7. When Sarkisian was questioned about records of payment by Ehret, he said he had no records because he paid in cash or by Swiss Bank. At trial, he testified payments made through Denver U. S. Bank.

8. Sarkisian testified he brought in missing invoice to Ehret immediately on his return to Denver within 10 days after seizure. In fact, records show invoice not delivered until May 13, 1969, some 19 days after seizure.

9. Sarkisian's explanation of the errors in entry of the goods is that a combination of mistakes by people connected with the entry combined to negative his honest plans.

a. Sarkisian claims that all the invoices were enclosed in the package delivered to a Pan American Airways man (by law, Sarkisian's agent) who "pulled enough invoices" to satisfy customs. This, he claims, caused part of the invoices to be inside and part outside of the package.

b. The Pan Am man also told him the carton, because of its $15,000.00 value, had to be sealed, so it was sewed in burlap and marked "all invoices inside," which was untrue.

c. In order to avoid Lebanon customs, it was necessary for a local broker (by law, Sarkisian's agent) to handle the bag. He required Sarkisian to remove the Lebanese invoices (written in French) and mail them separately.

d. Sarkisian thought he mailed them to his office, but subsequently claims he mailed them to his wife. He only wrote one short letter to his wife and it without adequate instructions, because the "bad light" in his hotel room in Beirut made writing difficult.

e. Even though Mr. Sarkisian knew that U. S. Customs was "checking him hard" and he had anticipated an antiquity problem and knew the shipment would arrive in Denver before he did, he gave no special instructions to his wife, sec-

retary or the customs broker. He asserted, "I guess I'm absent-minded on some things."

f. When his wife received the French invoices, she placed them in the file cabinet at Sarkisian's office, but she inadvertently failed to notify the secretary of their existence or their relationship to the Beirut shipment.

g. When the secretary was called by the customs broker for invoices, she could not find them or could not identify them if she did see them.

h. The customs broker, Mr. Schayer, who usually handled Mr. Sarkisian's goods, was out of town when the shipment arrived, and his assistant, Horton, was unfamiliar with what to do about a missing invoice.

i. The U. S. Customs inspector because of prior experiences with Mr. Sarkisian did not follow normal procedure and allow the invoices to be furnished later.

j. After the shipment had been seized, Sarkisian wrote a letter to Customs stating everything in it was an "antique".

k. When Morgan and Ehret came to investigate his letter, Sarkisian did not know antiquity was an issue, even though the seizure reasons had been explained to Horton.

l. Sarkisian contended that he purchased the goods from reputable dealers who guaranteed them as antiques. He checked them carefully as to style. He required special affidavits of ownership. In spite of these contentions the U. S. Cus-

toms did not agree as to antiquity. Sarkisian indicated it was possible that the goods were such good fakes, he could not detect them.

It would appear that for Sarkisian's shipment to have been entered under the circumstances of this case without fraudulent intent that a combination of the above events had to all coincide. I cannot believe that the Pan American agent, the Beirut broker, the secretary, the wife, the Denver customs broker and the U. S. Customs personnel all committed an error in advice or in action. It further appears exceedingly unlikely that a man with Mr. Sarkisian's experience could not have taken some action to have avoided the problems, since he was cognizant of what was going on during each step of the transaction. The excuses of "bad light" in Beirut, a forgetfulness of material aspects of the transaction and his right to "stretch the truth" a little because of the actions of Customs —all of these appear weak. Mr. Sarkisian was on the witness stand for quite sometime and convinced this Court that he is a very astute man. In fact, he is one of the most articulate and intelligent witnesses I have heard during fifteen years as a trial judge, and this militates against a finding that inadvertent mistakes caused the errors. Additionally, he is an expert in the field of antique jewelry and in the import industry and is completely conversant with the sundry regulations pertaining thereto.

It should also be noted that Sarkisian's rebuttal to the antiquities question is based on his own testimony

only. He did not call any other expert to support his opinion. However, this Court has no difficulty in finding the Mr. Sarkisian is a better expert than those called by the Government. The invoices cannot be used to bolster his opinion. Wood v. U.S., 41 U.S. 342. The affidavits, claimed by Sarkisian to have been ordered with the merchandise, but which arrived in December 1969, after the seizure, cannot be admissible to prove the truth of the statements therein, since this would be a violation of the hearsay rule and would negate the Government's right to confrontation and cross-examination. Seals v. U.S., 70 F.2d 519; Von Zedtwitz v. Sutherland, 26 F.2d 525. In Cintes v. U.S., 18 Ct. Cust. App. Reports 361 (T.D. 44614), it was held in the Customs Court that although affidavits may be required by customs regulations to aid the collector in determining whether or not merchandise should enter duty-free, such affidavits had no evidentiary value in the trial of the case.

Conclusion

Based on the foregoing, it appears that the contradictions inherent in Mr. Sarkisian's own conduct and testimony and the totally unlikely set of circumstances required to support his version of the facts, do not furnish a satisfactory explanation. Therefore, it is concluded that the claimant has not sustained his burden of proof to overcome the libelant's prima facie case. In other words, Mr. Sarkisian has not demonstrated his innocence.

Pursuant to Title 19, U.S. Code, Sec. 1592 (Sec. 592 of the Customs Laws), the United States, libelant herein, should prevail, and all items of the shipment seized by the United States Customs Inspector, not previously released to Mr. Sarkisian, should be declared forfeited to the United States to be disposed of pursuant to law.

Counsel for the Government is hereby directed to prepare formal judgment in accordance with the foregoing.

The Clerk of the Court is hereby directed to mail a copy hereof to counsel of record.

Dated this 22nd day of October, 1971.

/s/ Luther B. Eubanks
LUTHER B. EUBANKS

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. C-2384

UNITED STATES OF AMERICA, PLAINTIFF

vs.

ONE PACKAGE OF ANTIQUES AND INDIAN JEWELRY, DEFENDANTS

JUDGMENT ORDER

THIS MATTER coming to be heard for trial before this Court, sitting without a jury, commencing on May 6 and ending on May 12, 1971, the United States being represented by the United States Attorney's office and the claimant, H. Medill Sarkisian, being represented through his attorney, Albert B. Wolf, and the Court having heard the proofs of the parties and having reviewed all of the evidence and having filed its written opinion entitled "Findings of Fact and Conclusions of Law" on October 26, 1971, and having found that the plaintiff is entitled to judgment,

IT IS HEREBY ORDERED, ADJUDGED AND AGREED that the property described in Schedule A of plaintiff's Complaint filed herein and incorporated by reference in this Order, be and the same hereby is forfeited to the United States of America for the reasons stated in the Findings of Fact and Conclusions of Law; and

IT IS FURTHER ORDERED that the United States Marshal shall cause the above-described property to be delivered to the Port Director of Customs, U. S. Custom House, Denver, Colorado 80202, for disposition in accordance with the applicable law and regulations.

Dated this 29 day of October, 1971.

BY THE COURT:

/s/ Luther B. Eubanks
District Judge

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In the Supreme Court of the United States

OCTOBER TERM, 1973

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

H. MEDILL SARKISIAN

UNITED STATES OF AMERICA, PETITIONER

v.

ONE PACKAGE OF ANTIQUES AND INDIAN JEWELRY

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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In the
Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-252

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STATEMENT OF THE CASE

For present considerations only, we will accept the factual statement set forth in the government's petition. However, by so doing, we do not agree that the Record supports certain factual assertions therein.

This position is adopted because in our view certiorari is not designed for the review of factual determinations.

Accordingly, the failure of the government's contention that Respondent Sarkisian was responsible for the administrative delay in the court below is not considered herein except by passing observation that Respondent Sarkisian did not petition for remission or mitigation under 19 U.S.C. §1618.

ARGUMENT

THE PETITION HEREIN DOES NOT DISCLOSE THE EXISTENCE OF SPECIAL OR IMPORTANT REASONS TO JUSTIFY GRANTING CERTIORARI.

From its petition the government here appears to assert that certiorari should be granted for essentially two reasons: (1) the court of appeals' misapplication of a prior decision of this Court, *United States* v. *Thirty-Seven (37) Photographs*, 402 U.S. 363, 91 S.Ct. 1400 (1971); and (2) the effect which the decision below might have upon administrative activities of the Bureau of Customs. We contend that neither claim involves a special or important reason justifying certiorari consideration by this Court.

A. The Decision Below Was Not Fraught With a Misunderstanding of the Law.

In *Thirty-Seven (37) Photographs* this Court labored to eliminate administrative delay as a form of censorship. The court below properly applied similar philosophy to remedy an administrative delay which resulted in the confiscation of Respondent Sarkisian's property.

The government's unprecedented argument that First Amendment and Fifth Amendment involvements require different results ignores the obvious parallels when viewed in the present context. The court below aptly responded by observing:

> The withholding of Sarkisian's property under the circumstances before us presents a constitutional claim of no less dignity than that arising from dirty pictures. *Sarkisian v. United States*, 472 F.2d 468, 472 (10th Cir. 1973).

Legislative history considerations add no support to the government's contentions. 19 U.S.C. §1618 affords the right *but not the obligation* to petition the Secretary of the Treasury for administrative relief in the nature of remission or mitigation of fine, penalty or forfeiture. Thus Congress did not make administrative review mandatory but left its initiation to the person aggrieved.

The Record here discloses that review was invoked by the administrative agency itself in "treating" Respondent's inquiry letter as a petition for remission or mitigation (Tr. 27, 149-50; see also Government's Petition herein, p. 9). The court below properly disposed of the government's factual contention that its delay was caused by Respondent Sarkisian's acts. His efforts were aimed at speeding up the determination of government's forfeiture claim, not delaying it. This is evidenced by *his* initiation of judicial intervention after twelve months of administrative shuffling.

Actually the congressional intent here is more manifest than in the obscenity situations. The obscenity provision, 19 U.S.C. §1305, does not include accelerative language comparable to that in 19 U.S.C. §§1602 and 1604 involved here. Even against the government's then urging that the later-cited sections furnished sufficient time limits in obscenity cases, this Court expressly observed that they did not. *United States* v. *Thirty-Seven (37) Photographs, supra* at 368, 91 S.Ct. at 1404 (fn. 2). The contention that the administrative process may, because 19 U.S.C. §1603 does not require prompt reporting to the United States attorney, delay conclusive determination indefinitely is constitutionally unfathomable. Congress' use of the terms "immediately" "forthwith" and "without delay" in Sections 1602 and 1604 manifested its clear intent to abbreviate the time between seizure and forfeiture determination to thus avoid an unconstitutional deprivation of the use and enjoyment of property.

The government's suggestion that the general five-year forfeiture statute of limitations of 19 U.S.C. §1621 extends administrative processing time overlooks the fact that such

section is equally applicable to obscenity forfeiture provisions and is constitutionally offensive in either instance.

Accordingly, the self-invoked administrative processes and the government's unjustified delay here clearly demanded the results below and elicit no question of importance for present consideration by this Court.

B. The Fears of the Bureau of Customs Do Not Warrant Certiorari.

The government's claim that the decision below might disrupt the administrative processing of customs seizure overlooks several significant considerations. First, the constitutional right to the enjoyment of property cannot be made subservient to bureaucratic procedures. Second, Respondent Sarkisian did not initiate administrative processing, such procedures were not required and the processing here was inexcusably protracted.

The Record here amply reflects that Respondent Sarkisian was aggrieved by the self-invoked "administrative relief" procedures and, in obvious desperation himself went to court for relief.

We find neither logic nor precedent for certiorari being used as a means to allay the fears of a governmental agency that a court decision against it might compel more efficient operation on its part. Even government counsel and one of the trial court judges below were constrained to observe in open court that it was difficult to get customs to act (Tr. 4-9, Hearings of July 17, 1970).

Careful consideration of and adherence to the decision below, *Thirty-Seven (37) Photographs* and the applicable statutory provisions would lead customs into avoiding unfavorable future results. We suggest that in the future customs give formal notice that by seeking administrative remission or mitigation the petitioner thereby waives speedy trial rights. Additionally, Customs must obviously act more expeditiously than it did here. Prompt referral to prosecuting officers would

be unnecessary providing that persons aggrieved by seizures intentionally and knowingly initiate administrative consideration and thus waive their rights to prompt judicial determination and providing, further, that the Customs Bureau, itself, act with reasonable dispatch.

Accordingly, we submit that the expressed fears of Customs are easily soluble and do not require either the time or attention of this Court.

CONCLUSIONS

For the above and foregoing reasons we submit that the Petition for Writ of Certiorari does not raise questions of sufficient magnitude or importance for consideration by this Court and that the decision below was both well-reasoned and legally sound. Accordingly, we urge that the Petition for Certiorari be denied.

Respectfully submitted,

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